Supreme Court, U.S.
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86-2011

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CLARENCE J. WILSON, ET AL,
Petitioners,

v.

ARMSTRONG WORLD INDUSTRIES, CELOTEX CORPORATION, EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, OWENS-ILLINOIS, INC., PITTSBURGH CORNING CORP., RAYMARK INDUSTRIES, INC. AND STANDARD INSULATIONS, INC.,
Respondents.

Appeal From The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a district court have discretion to refuse a challenge for cause of a juror who admits an actual bias?

2. Is harm presumed where a district court fails to excuse a juror who admits an actual bias?

LIST OF PARTIES

Petitioners

Robert C. Belinge
Vernon W. Botter
Lloyd B. Brannen
B. C. Brown
John W. Campbell
Russell F. Cash
Leslie B. Childers
Robert R. Childers
Edwin E. Cimerhanzel
John W. Copeland
Ralph Daigle
Gilbert P. Davis
Tommie L. Easley
Billy Green
Edward F. Grein
Johnny Louis Grein
Leo V. Grein
Marvin G. Grein
Wilford B. Grimes
James C. Harrison
Ernest L. Hartwell
William H. Howard
William C. Jones
Charles O. Kramer
H. Louis Loyd
Michael S. Massey
William J. Massey
Carl J. Moeller
Tommy L. Murphree
Luke Naquin
Louis E. Oldham
Robert C. Oliver
Leemon R. Pennington
Joel Ross
Ralph Ross

Petitioners

Wilson E. Rudy
Alton B. Sanford
Jesse A. Shrader
William C. Stanley
Jeff Steed
David Strebeck
William C. Taylor
Harvey Lee Thompson
Johnnie C. Todd
Victor E. Turner
Murray E. Wilkening
Vernon T. Williams
Clarence J. Wilson
Frank J. Wishard
Augustin O. Zarate

Respondents

Armstrong World Industries
Celotex Corporation
Eagle-Picher Industries, Inc.
Fibreboard Corporation
Owens-Corning Fiberglas Corporation
Owens-Illinois, Inc.
Pittsburgh Corning Corp.
Raymark Industries, Inc.
Standard Insulations, Inc.

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REFERENCE TO OFFICIAL REPORT OF OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is officially recorded at 810 F.2d 1358 (5th Cir. 1987), and attached as Appendix A.

The District Court authored an opinion found at 107 F.R.D. 250 which does not address the issues before the Court.

JURISDICTIONAL STATEMENT

The grounds on which jurisdiction of this Court is invoked are:

(1) The date of the judgment sought to be reviewed is February 26, 1987.

(2) Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc was overruled on March 26, 1987. No extension of time within which to petition for certiorari has been requested.

(3) The statutory provision conferring on this Court's jurisdictional review of the judgment in question by writ of certiorari is 28 U.S.C., § 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

1) The Constitution of the United States, Amendment VII:

In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

2) 28 U.S.C., § 1861. Declaration of policy:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit jury selected at random from a fair cross-section of the community in the district or division wherein the court convenes.

3) 28 U.S.C., § 1870. Challenges:

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

STATEMENT OF THE CASE

Petitioners are fifty men suffering serious lung injuries as a result of their asbestos exposure while working as insulators, pipefitters and electricians. Their asbestos exposure was caused by the use of the asbestos laden products produced and marketed by respondents.

Their jury trial, by which they sought reasonable compensation for their debilitating injuries, began on April 15, 1985. The District Judge, Honorable Hugh Gibson, conducted the voir dire. In response to the court's first inquiry, prospective juror Wang, in the presence of the entire jury panel, expressed his opinion on a fact directly in issue in the case. Wang stated that the carcinogenicity of asbestos was not known until "3 or 4 years ago" (Wang at 12-14).

Juror Wang was called to a bench conference out of the hearing of the remaining panel members where he repeated his previously-stated opinion and added that he would be "partial" in weighing the evidence and arriving at a verdict in the case and, in essence, he could not disregard his expert knowledge in his deliberations if chosen as a juror (Wang at 14). The exchange with Wang is set forth verbatim as follows:

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23 THE COURT: Yes, sir. Thank you. Yes. First row.
24 JUROR WANG: Juror No. 6. I'm a Ph.D. chemist,
25 and I'm working with Dow Chemicals in research.

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1 THE COURT: Yes.
2 JUROR WANG: And in my line of research, I'm
3 usually making new chemicals, which—usually you
4 don't know what the problem or not.
5 THE COURT: You are a chemist?

JUROR WANG: Yes.
THE COURT: Have you had any particular reason to know about asbestos?
JUROR WANG: All I do—
THE COURT: Have you ever worked with it or done any particular study with regard to asbestos?
JUROR WANG: No.
THE COURT: Good. Thank you.
JUROR WANG: But all I have is, I have read about it, and actually, asbestos, the carcinogenicity was not known until several years ago.
THE COURT: Okay. Do you want to come up?

(Whereupon, the following sidebar discussion was held outside the hearing of the jury:)

THE COURT: You are a chemist and you have read about asbestos?
JUROR WANG: Yes.
THE COURT: And what is it that you have read about it that

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you wish now to report?
JUROR WANG: Well, it's a carcinogenic, asbestos is known, for maybe about three or four years ago, maybe.
THE COURT: Okay.
JUROR WANG: And I'm making a new chemical which is usually not known as a carcinogenic or what-not. You're making a compound and you don't—
THE COURT: Just a second. I want the best answer you can give me to this: Could you sit as a juror and listen to the evidence, and there's going to be evidence with regard to the characteristics of asbestos and what

was known about asbestos at a given time in the past, and accept that testimony after you have weighed it for credibility, and come to a verdict based only on the evidence that you hear developed during the course of this trial; can you do that?

JUROR WANG: I'm afraid that I'm a little bit partial.

THE COURT: All right. You would—you would import into your thinking things that you know regardless of what might be said upon the stand?

JUROR WANG: Yes, sir.

THE COURT: All right. Thank you.

Plaintiffs' challenge for cause of Wang was overruled (Gibson, J. at 68-69). As a result of the failure to excuse Wang for cause, Petitioners were required to expend a peremptory challenge and, in so doing, were unable to utilize a peremptory challenge against another objectionable juror, Leverton, who was eventually voted foreman of the jury which, not surprisingly, returned a defensive verdict as to respondents (Transcript pp. 2269-2274).

Judgment was entered for respondents on August 27, 1985 (Record pp. 79-82). Petitioners' Motion to Disregard the Jury Verdict (Record pp. 140-148) and Motion for New Trial (Record pp. 53-78) were overruled (Record p. 82), after which Petitioners appealed to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit Court of Appeals heard oral arguments on October 14, 1986, and handed down its panel decision affirming the lower court's actions on February 26, 1987. Petitioners' Petition for Rehearing and for Rehearing En Banc were timely filed but denied March 26, 1987.

From these decisions denying Petitioners' right to a fair and impartial jury, review by Writ of Certiorari by this Honorable Court is sought.

Original Federal jurisdiction in the district court was premised upon diversity of citizenship under 28 U.S.C. § 1332.

ARGUMENT FOR THE ALLOWANCE OF THE WRIT

At stake in this case is the fundamental right of a trial by a fair and impartial jury. The American tradition of trial by jury necessarily contemplates an impartial jury drawn from a cross-section of the community. *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 220 (1946); *Smith v. Texas,* 311 U.S. 128 (1940).

The right of peremptory challenges is, of course, borrowed from England. *Swain v. Alabama,* 380 U.S. 202, 213 (1965). In contrast to the courts in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country. *Swain, supra* at 218. The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. *Lewis v. United States,* 146 U.S. 370 (1892). The denial or impairment of the right to exercise peremptory challenges is reversible error without a showing of prejudice. *Lewis v. United States, supra; Harrison v. United States,* 163 U.S. 140 (1896). In *Lewis,* this Court stated:

> For it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its purpose.

Lewis v. United States, 146 U.S. at 378.

Here, Petitioners' right to exercise peremptory challenges freely and fully was severely impaired by the district court's failure to exercise prospective juror Wang for cause because of his admitted actual bias.

During the voir dire stage of the trial, Wang expressed an actual bias against a position attempted to be proven by Petitioners. Specifically, Wang, a Ph.D. chemist with the Dow Chemical Co., asserted his belief that the carcinogenicity of asbestos had not been known until 3-4 years previously (Wang at 13-14). He came to this conclusion as a result of his expert work with his employer, Dow Chemical Co. Wang further believed that because of his employment and because of his specialized knowledge of asbestos and its hazards, he would be "partial" and that he could not set aside his specialized knowledge in considering the evidence if chosen as a juror (Wang at 13-15).

A juror who has formed an opinion as to the issue to be tried cannot be impartial and should be excused for cause. *Irvin v. Dowd,* 366 U.S. 717, 722 (1961); *Reynolds v. United States,* 98 U.S. 244, 246 (1878). As illustrated above, Wang held a firm belief on the date that the danger of working in and around asbestos was scientifically knowable. That issue was directly submitted to the jury in its special interrogatories.

Because of the district court's failure to excuse Wang for cause, Petitioners were required to exercise one of their peremptory challenges on Wang. The district court effectively impaired Petitioners' right to fully and freely exercise the right of peremptory challenges. The impairment of the right of peremptory challenges has been held by this Court to be reversible error without a showing of further prejudice. *Lewis v. United States, supra.*

Even if error were not presumed under this Court's holding in *Lewis v. United States, supra,* and *Swain v. Alabama, supra,* Petitioners can demonstrate actual harm by having to accept another biased juror because of not having a sufficient number of peremptory challenges after challenging Wang. The juror's name is Leverton. Leverton's employer, Union Carbide, Inc., is and was involved in asbestos litigation and is a member of the Asbestos Claim Facility, a group of producers and distributors of asbestos products organized to defend asbestos injury claims. Although these facts may not have been sufficient to show that Leverton was actually biased, they certainly indicate a valid basis upon which Petitioners intended to exercise a peremptory challenge had they not been required to utilize one of the precious few on Wang.

Harm, even if not presumed according to *Lewis* and *Swain,* is amply demonstrated.

The Fifth Circuit Court of Appeals' panel opinion simply fails to follow this Court's decisions in *Lewis* and *Swain* and even its own decision in *United States v. Nell,* 526 F.2d 1223 (5th Cir. 1976). There, the Fifth Circuit Court of Appeals reversed and remanded for new trial where, as here, a prospective juror exhibited an actual bias. Had the Fifth Circuit Court of Appeals followed even its own decision in *United States v. Nell,* this case would have been reversed and remanded for new trial. As such, not only is the Fifth Circuit Court of Appeals' panel opinion in this case violative of this Court's decisions in *Swain* and *Lewis,* it is contrary to a previous controlling precedent within the Fifth Circuit.

CONCLUSION

No case before the Court during this term or any other term will touch a more fundamental right than that presented here—the right of trial by a fair and impartial jury. The Court has previously been zealous in its guard against the "subtle undermining of the jury system." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946). In *Thiel*, and here, the undermining of the jury system has taken place and a "new trial by a jury drawn from a panel properly and fairly chosen," is required. These fifty men deserve to have their cases heard by a properly empaneled jury where "the extremes of partiality on both sides have been eliminated," and with the "appearance of justice." *Swain v. Alabama*, 380 U.S. 202 (1965). To date, these men have been denied this fundamental right. The issues are very worthy of this Court's consideration on writ of certiorari because the underlying decisions violate this Court's holdings in *Lewis* and *Swain* and even the Fifth Circuit's own opinion in *Nell, supra.*

Respectfully submitted,

ROBERT E. BALLARD

GRANT KAISER

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Attorneys for Petitioners-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been forwarded to all attorneys of record, by certified mail, or hand delivery, on this the _____ day of May, 1987.

GRANT KAISER

APPENDIX A

Clarence J. WILSON, et al.,
Plaintiffs-Appellants,

v.

JOHNS-MANVILLE SALES CORP., et al.,
Defendants-Appellees.

No. 85-2727.

United States Court of Appeals,
Fifth Circuit.

Feb. 26, 1987.

Products liability action was brought against manufacturers of products containing asbestos. The United States District Court for the Southern District of Texas, Hugh Gibson, J., entered judgment on jury verdict for certain defendants, and plaintiffs appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) refusal to sustain plaintiffs' challenge for cause to one of the veniremen was not abuse of discretion; (2) defendants' opening argument was not sufficiently prejudicial to deny plaintiffs fair trial; and (3) exclusion of plaintiffs' expert witness' testimony was appropriate sanction for witness' deliberate refusal to comply with discovery order.

Affirmed.

See also 107 F.R.D. 250

Grant Kaiser, Robert E. Ballard, Houston, Tex., for plaintiffs-appellants.

Michael B. Schwartz, Butler, Binion, Rice, Cook & Knapp, Elizabeth Thompson, Houston, Tex., for Raymark Industries, Inc.

Richard L. Josephson, Baker & Botts, Arthur Stamm, Houston, Tex., for Armstrong World Industries, Eagle-Picher, Owens-Illinois, Inc. and Owens-Corning Fiberglas.

Weller, Wheelus & Green, David L. Tolin, Beaumont, Tex., for Fibreboard Corp.

Mehaffey, Weber, Keith & Gonsoulin, Gene M. Williams, Sandra F. Clark, Beaumont, Tex., for Standard Insulations, Inc.

Hallmark & Boswell, John H. Boswell, Houston, Tex., for Armstrong World Industries.

Gray & Keene, Richard C. Keene, San Antonio, Tex., for Forth-Eight Insulations, Inc.

Benckenstein, Norvell & Bernsen, Gail C. Jenkins, Beaumont, Tex., for Celotex Corp.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal is from a jury verdict favoring appellees, manufacturers of asbestos products, in a consolidated products liability action involving fifty claimants. Appellants, the claimants, challenge three discretionary rulings of the district court and ask that the case be reversed and remanded for a new trial. They claim that the district

court erred in failing to sustain their challenge for cause to one of the prospective jurors, in allowing appellees to make improper and prejudicial comments during opening statement, and in excluding the testimony of one of their expert witnesses. Because we find that the district court did not abuse its discretion, we affirm the judgment.

I. *Facts*

Appellants comprise a group of fifty insulators, pipe fitters, and electricians allegedly suffering from asbestos-related injuries and illnesses. Appellees are or were manufacturers of asbestos-containing insulation products. Each appellant individually had brought suit against the manufacturers in the Galveston Division of the United States District Court for the Southern District of Texas. Their causes of action were consolidated by order of the district court on February 21, 1985.

The district court ordered separate trials on the issues of liability and damages pursuant to Fed. R. Civ. P. 42(a). There first was to be a single trial to determine whether the manufacturers generally were liable to the claimants and whether punitive damages should be assessed. If the claimants prevailed on the issue of the manufacturers' liability, the court then would order separate trials to determine each individual's damages.

In the trial of the common issue of general liability, the jury found that while most of the products contained asbestos and were capable of producing sufficient dust to cause bodily injury, only Celotex Corp., Pittsburgh-Corning Corp., and RayMark Industries, Inc. could be liable to appellants because they failed to warn adequately of the dangers of their asbestos-containing products. The

jury also determined that none of the manufacturers had acted carelessly or recklessly. No punitive damages were assessed. The district court decided that there was no just reason for delay and entered a final judgment in favor of Armstrong World Industries, Eagle-Picher Industries, Inc., Fibreboard Corp., Owens-Corning Fiberglass Corp., Owens-Illinois, Inc., and Standard Insulations, Inc. Appellants then filed a timely notice of appeal from the take-nothing judgment involving the six appellees. The three remaining appellees did not seek an interlocutory appeal in this action, and their cases are still pending before the district court.

II. *The Challenge for Cause*

[1] Appellants request us to reverse the decision below and remand for a new trial because the district court erred in refusing to sustain their challenge for cause to one of the veniremen, Dr. Wang. They contend that Dr. Wang's responses to questions posed by the district court clearly indicated the existence of actual prejudice and that, once bias was established, they automatically were entitled to have the district court excuse Dr. Wang. By denying their challenge for cause, the district court forced appellants to use one of their peremptory challenges to strike Dr. Wang from the jury panel. Appellants also claim that as a result of the necessity to use a peremptory challenge when grounds for a challenge for cause had been established, they were unable to remove another objectionable juror, John B. Leverton, from the panel. Thus, they assert prejudice by the error of the district court. We do not find appellants allegations to be justified.

At the commencement of voir dire, the district court asked all of the prospective jurors, "Do have [sic] you

have any connection at all, have any particular interest in or know anything particularly about any of these corporations, each of which at one time, if not now, was in the business of manufacturing and marketing asbestos products?" Dr. Wang informed the court that he was a research chemist with Dow Chemical and that, while he had never worked with asbestos, he had read about it. He stated that "the carcinogenicity [of asbestos] was not known until several years ago."

Dr. Wang's comments indicated the existence of some potential area of bias on his part. Once the possibility of actual prejudice has emerged, appellants argue that "the court has the duty to develop the facts fully enough so that it can make an informed judgment on the question of 'actual' bias." *United States v. Nell,* 526 F.2d 1223, 1229 (5th Cir. 1976). We find no error in the district court's exercise of discretion in carrying out this duty.

After Dr. Wang made known his familiarity with asbestos, the district court immediately asked him to approach the bench. In the presence of counsel, the court conferred with him about his ability to return a verdict based solely on the evidence.[1] While Dr. Wang indicated

1. While at the bench, the following conversation took place:
THE COURT: You are a chemist and you have read about asbestos?
JUROR WANG: Yes.
THE COURT: And what is it that you read about it that you wish now to report?
JUROR WANG: Well, its a carcinogenic, asbestos is known, for maybe about three or four years ago, maybe.
THE COURT: Okay.
JUROR WANG: And I'm making a new chemical which is usually not known as a carcinogenic or whatnot. You're making a compound and you don't—
THE COURT: Just a second. I want the best answer you can

that it would be difficult for him to be impartial, we cannot say that this evidence of bias is automatically disqualifying. The court apparently was satisfied by Dr. Wang's response and demeanor, and appellants made no objection.

After the court finished its own examination of the veniremen, all of the parties were allowed to examine the prospective jurors in order to explore fully any problems which they may have perceived. Appellants used this opportunity to question Dr. Wang extensively about the nature and scope of his employment at Dow Chemical, a company which they claimed was deeply involved in asbestos litigation. This concern served as the sole basis of appellants' challenge for cause to Dr. Wang.[2] The issue of actual or potential personal bias on the part of Dr. Wang was never raised by appellants until this appeal.

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give me to this: Could you sit as a juror and listen to the evidence, and there's going to be evidence with regard to the characteristics of asbestos and what was known about asbestos at a given time in the past, and accept that testimony after you have weighed it for credibility, and come to a verdict based only on the evidence that you hear developed during the course of this trial; can you do that?
JUROR WANG: I'm afraid that I'm a little bit partial.
THE COURT: All right. You would—you would import into your thinking things that you knew regardless of what might be said upon the stand?
JUROR WANG: Yes, sir.
THE COURT: All right. Thank you.

2. The following exchange took place at the close of voir dire:
MR. BALLARD: Your Honor, along that line, could we challenge Dr. Wang? He's the chemist that works for Dow and is very involved in asbestos litigation before this very Court?
THE COURT: Has he been involved before this Court?
MR. BALLARD: He hasn't, but his employer has, and he's in the chemistry department.
THE COURT: Is there any objection to the challenging?
MR. STAMM: We object.
THE COURT: I do not see a basis for challenging for cause.

Since the district court is in the best position to observe the juror and to make a first-hand evaluation of his ability to be fair, it is given broad discretion in determining a juror's impartiality. *United States v. Salinas,* 654 F.2d 319, 328 (5th Cir. 1981). "The determination as to the impartiality of a juror . . . will not be reversed absent an abuse of [the court's] discretion." *United States v. Apodaca,* 666 F.2d 89, 94 (5th Cir. 1982). *See also United States v. Brown,* 644 F.2d 101, 104 (2d Cir. 1981) ("In order for a trial judge's determination of a juror's impartiality to be set aside, there must be shown 'manifest' prejudice.").

We find nothing in this case requiring us to reverse the decision of the district court. There is no question that the district court correctly denied the challenge for cause on the basis of Dr. Wang's employment with Dow Chemical. *See Lusich v. Bloomfield Steamship Co.,* 355 F.2d 770, 775 (5th Cir. 1966) ("The mere fact alone that a member of the jury panel is in the same business as that of one of the litigants . . . does not make him subject to challenge for cause."). The question of Dr. Wang's bias is somewhat ambiguous, and since counsel for appellants neither pursued the matter nor mentioned it in their challenge for cause, we do not find an abuse of discretion requiring a new trial.

Hopkins v. County of Laramie, Wyoming, 730 F.2d 603, 605 (10th Cir. 1984) is closely analogous. It involved a civil rights action under 42 U.S.C. § 1983. At the conclusion of the voir dire, plaintiffs challenged three jurors for cause. The court denied the challenges, but asked plaintiffs if they had any further questions. They did not, and plaintiffs then exercised three peremptory

challenges to excuse the jurors. On appeal, the Tenth Circuit found that since plaintiffs' counsel did not take advantage of the opportunity to convince the court of the propriety of the challenges for cause by asking further questions, it was not an abuse of discretion for the district court to deny the challenges. To the same effect is *United States v. Brown*, 644 F.2d 101 (2d Cir. 1981), a criminal case. The defendant in *Brown* claimed that the district court should have sustained a challenge for cause to a potential juror who worked for another branch of the bank the defendant allegedly had robbed. Instead, the juror had to be removed by the use of a peremptory challenge. Upon appeal, the court held that since defense counsel was given the opportunity at trial to prove the contention that the prospective juror possessed actual bias and that opportunity was not pursued, the district court did not commit error by not finding such bias.

Since we find there was no abuse of discretion in the court's decision not to grant appellants' challenge of Dr. Wang for cause, we need not go into the question of whether prejudice resulting from an abuse of discretion has been shown.

III. *Opening Statement*

[2] Appellants claim that appellees' prejudicial arguments during opening statement effectively denied them a fair trial.[3] We are not persuaded. "To justify a reversal based on improper comments of counsel, the conduct

3. Appellants allege that appellees' statements that "plaintiffs' assertion of gross negligence are pure nonsense" and that their "real motivation" was "simple greed" were improper appeals to prejudice and passion. They also claim that the comments concerning the jury as the final arbiter of what was fair were far beyond the proper scope of an opening statement.

must be such as to gravely impair the calm and dispassionate consideration of the case by the jury." *Dixon v. International Harvester Co.*, 754 F.2d 573, 585 (5th Cir. 1985). The alleged offending remarks were made at the commencement of a three week trial which included the testimony of numerous live witnesses and the introduction of a large number of depositions and exhibits. It is highly unlikely that a few somewhat exaggerated statements by appellees' counsel in his opening presentation so impermissibly tainted the jury's verdict as to require a new trial.

Additionally, the district court clearly instructed the jury at the beginning of opening statement:

> On the other side, there is this statement that you should always keep in mind, and that is, what the attorneys say in opening statement and, lastly, in argument to you, when all the evidence is in, that what the attorneys say is not evidence. This is clearly so, because the attorneys will speak much, but they are not going to say a single word as a witness under oath, sitting in the witness box. And it is from there that the evidence comes. So what the attorneys say is not evidence. And you will keep that in mind.

The court repeated its warning after all the parties had made their opening statements:

> A brief comment before we conclude. . . . I told you, and I will again remind you that the factual assertions that the attorneys have made in their opening statements is not evidence. . . . And secondly, the lawyers have recited what they think the Court is going to instruct you. They may and then again they may not be correct in that regard.

These cautionary instructions specifically address and effectively defuse possible prejudice that might have arisen assuming appellees' comments during opening statement went beyond proper bounds.

We have held that objectionable comments should be considered "within the context of the court's rulings on objections, the jury charge, and any corrective measures applied by the trial court. Alleged improprieties may well be cured by an admonition or charge to the jury." *Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233, 1238 (5th Cir. 1985) (closing argument challenged for impropriety.) In viewing the opening statement as a whole, we find that the effect of appellees' allegedly improper statements, although somewhat more extreme than is the norm, was not prejudicial, especially in light of the court's cautionary instructions.

IV. *Exclusion of Expert Witness*

[3] Appellants' final contention is that the district court abused its discretion by excluding the testimony of Barry Castleman, one of appellants' expert witnesses. The exclusion, however, was the result of Castleman's deliberate refusal to produce certain discovery material which the court deemed relevant to appellees' case.[4] "Con-

4. The court ordered Castleman to produce the following items before he would be allowed to testify:

1. Copies of any articles, pamphlets, parts of books or books written by you or to which you contributed, which are related to your expected testimony, whether actually published or not, and a list of all such documents.
2. Copies of any written correspondence which you have sent to or received from any organization that represents any concern in the asbestos litigation, whether a defendant plaintiff or litigation group.
3. Copies of any written correspondence which you have sent

trol of discovery is committed to the sound discretion of the trial court and its discovery rulings will be reversed only where they are arbitrary or clearly unreasonable." *Mayo v. Tri-Bell Industries, Inc.*, 787 F.2d 1007, 1012 (5th Cir. 1986). We do not find any abuse of discretion.

The issue arose when appellees served Castleman with a subpoena *duces tecum* to produce certain documents at his deposition on April 9, 1985 in Houston.[5] Castleman stated at the deposition that he would not produce the documents because he did not feel that the discovery order was appropriate. Castleman testified that the production of written correspondence between him and any asbestos litigation defendants, plaintiffs, litigation groups, or governmental agencies would threaten his ability to earn a living and would potentially jeopardize confidential relationships. There was no justification, however, for Castleman's refusal to comply with the court's order since the documents might have contained relevant information that Castleman was a paid "expert" witness in a number of asbestos cases and the amount of money he had earned through such testimony.

After Castleman's refusal, appellees moved for sanctions, and the district court ordered that Castleman not be permitted to testify until he complied with the discovery request. The exclusion was conditional, and Castleman was given every opportunity to produce the neces-

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to or received from any governmental agency regarding asbestos, asbestos-related disease, the current defendants or any former defendants of these lawsuits, or relating to regulation of any industry that utilizes asbestos-containing products.

5. Appellees had attempted to depose Castleman on March 20, 1985 in Washington, D.C., but he failed to appear.

sary documents. It is well established that "the district court has discretion to impose appropriate sanctions against noncompliance with discovery requests." *Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982). This sanction was appropriate. Further, no showing is made that Castleman was the only expert who could testify in support of appellants. Appellants were not deprived of their case by the exclusion of a single recalcitrant witness.

CONCLUSION

The district court did not abuse its discretion in deciding the three procedural issues now before this Court. The judgment of the district court is

AFFIRMED.

86-2011

Supreme Court, U.S.
FILED
MAY 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CLARENCE J. WILSON, ET AL,
Petitioners,

v.

ARMSTRONG WORLD INDUSTRIES, CELOTEX CORPORATION, EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, OWENS-ILLINOIS, INC., PITTSBURGH CORNING CORP., RAYMARK INDUSTRIES, INC. AND STANDARD INSULATIONS, INC.,
Respondents.

Appeal From The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2727

CLARENCE J. WILSON, ET AL.,
Plaintiffs-Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 02-26-87, 5 Cir., 198__, ____F.2d____)

(March 26, 1987)

Before GEE, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. S. WILLIAMS
United States Circuit Judge

Clarence J. WILSON

v.

JOHNS-MANVILLE SALES CORPORATION, Fibreboard Corporation, Armstrong World Industries, Inc., Celotex Corporation, Combustion Engineering, Inc., Eagle-Picher Industries, Inc., Owens-Corning Fiberglas Corporation, Pittsburgh Corning Corp., Ruberoid Co., A Division of GAF Corp., Unarco Industries, Inc., Owens-Illinois, Inc., Forty-Eight Insulations, Inc., Raybestos Manhattan Corp., Keene Corporation, Standard Asbestos MFG and Insulating Company.

No. Civ. A. G-81-168.

UNITED STATES DISTRICT COURT,
S.D. Texas,
Galveston Division.

July 9, 1985.

Robert Ballard, Lawrence Madeksho, Jane Frazier, Kronzer, Abraham, Watkins, Nichols, Ballard & Friend, Houston, Tex., for plaintiff.

Craig Clendenin, Lyn Stevens, Weller, Wheelus & Green, Beaumont, Tex., for Fibreboard Corp.

John H. Boswell, David Carlson, Hallmark & Boswell, Houston, Tex., for Armstrong World Industries.

Gail Jenkins, David Groves, Lipscomb Norvell, Benckenstein, Norvell & Bernsen, Beaumont, Tex., for Celotex Corp.

Frank Bean, Andrew McKinney, Bean & Manning, Houston, Tex., for Eagle-Picher Industries, Inc.

Samuel E. Stubbs, James Crosby, Fulbright & Jaworski, Houston, Tex., for Owens-Corning Fiberglas.

Ronald E. Cook, Mayor, Day & Caldwell, Houston, Tex., for Pittsburgh Corning Corp.

Art Stamm, Richard L. Josephson, John Sullivan, Baker & Botts, Houston, Tex., for Owens-Illinois, Inc.

Larry Knapp, Wyckoff, Russell, Dunn & Frazier, Houston, Tex., for Forty-Eight Insulations, Inc.

Elizabeth Thomas, Jeff McClure, Butler, Binion, Rice, Cook & Knapp, Houston, Tex., for Raybestos-Manhattan Corp.

Sandra F. Clark, Gene M. Williams, Mehaffy, Weber, Keith & Gonsoulin, Beaumont, Tex., for Standard Insulations, Inc.

MEMORANDUM

HUGH GIBSON, District Judge.

This Court recently concluded a seventeen-day trial in which the suits of fifty asbestos claimants were joined together for a single trial on the bifurcated issues of liability and punitive damages. In this memorandum, the Court explains its reasons for implementing this novel approach to asbestos litigation.

Litigation premised on asbestos exposure is by far the largest area of products liability litigation in the United States today. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1336 app. (5th Cir. 1985). As of March 1983, there were more than 24,000 asbestos claims pend-

ing, with new suits being filed at an average rate of 500 per month. *Id.* Although there is no authoritative estimate for the number of asbestos claims that ultimately may be filed, it is certain that courts can expect a staggering number of claims in the years to come. *Id.*

The magnitude of asbestos litigation is of particular concern to this Court, which has more than 150 asbestos cases pending on its 750 case docket. Because of the extensive number of claims pending and the lengthy nature of an asbestos trial, this Court is currently unable to afford each asbestos plaintiff an individual trial. As a consequence, allegedly injured parties are being denied their day in court while their claims grow older and the backlog of asbestos cases grows. This state of affairs is entirely unacceptable to the Court. The Court must accordingly devise an innovative and efficient procedure for the timely resolution of asbestos claims. The procedure should, to the fullest extent possible, achieve both fairness to the parties and judicial economy.

The Court has learned through trial experience that an asbestos trial may be viewed as being comprised of two distinct phases. The so-called first phase involves the issue of product defectiveness. In this phase, the plaintiff seeks to establish that the defendants' asbestos containing products were defective as marketed and unreasonably dangerous because of the manufacturer's failure to provide an adequate warning. Because under Texas law a manufacturer's duty to warn is limited to those dangers which are foreseeable. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S. Ct. 127, 42 L.Ed.2d 107 (1974), the plaintiff is compelled to introduce evidence establish-

ing that the defendants knew, or should have known, that insulators and other end-product users, such as most of the asbestos plaintiffs before this court, were at risk from exposure to asbestos containing products. In order to meet this burden the plaintiff will introduce state of the art evidence. This evidence consists of an historical survey of the scientific and medical literature regarding the health hazards posed by asbestos and the opinions of the plaintiffs' and defendants' expert witnesses as to what knowledge or notice this literature did or did not impart to the asbestos manufacturers during the relevant time periods.

Related to the issue of product defectiveness is the issue of punitive damages. In seeking to prove an entitlement to punitive damages, the plaintiff argues that the state of the art evidence establishes that the defendant manufacturers knew that insulators and other end-product users were at substantial risk from exposure to asbestos products. The manufacturers' marketing of their asbestos products without adequate warnings despite this knowledge thus constituted callous and reckless conduct in disregard to the insulators' welfare and safety.

It has been the Court's experience that the presentation of the state of the art evidence, offered for the issues of product defectiveness and punitive damages, has become standardized in that it differs little from trial to trial and is not specifically tailored to a particular plaintiff's case. The Court has further learned that the state of the art phase of an asbestos trial constitutes an appreciable portion of the total trial time.

The so-called second phase of an asbestos trial concerns the issues of exposure, causation, injury and com-

pensatory damages. Unlike the first phase of the trial where the state of the art evidence is introduced, this portion of the trial involves distinct factual issues peculiar to each particular plaintiff.

[1, 2] Rule 42(a) of the Fed. R. Civ. P. permits the court to order consolidation and a single trial of different cases on the court's docket, or of issues within those cases, when the cases involve a common question of law or fact. The purpose of Rule 42(a) is to grant trial courts broad discretion to manage their dockets efficiently while providing justice to the parties. 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2381 at 253 (1971). Because the issues of product defectiveness and punitive damages are questions of fact common to all of the court's pending asbestos cases, the Court concludes that consolidation, for the resolution of the product defectiveness and punitive damages issues, is appropriate for the Court's pending asbestos cases.

Rather than consolidating all of the Court's more than 150 asbestos cases, however, the Court concludes, for administrative reasons, that the initial consolidated trial shall be comprised of 50 cases. Consolidation of 50 cases for a single trial on the issues of product defectiveness and punitive damages will promote judicial economy and fairness to the litigants in several important respects. The consolidation will finally enable many asbestos claimants, heretofore denied their day in court because of the backlog of asbestos cases, to present their allegations of product defectiveness to a jury. Consolidation will also significantly conserve judicial resources. Whereas without the consolidation the same lengthy state of the art evidence would have to be repeated in 50 separate trials, consolidation allows the common factual questions of

product defectiveness and punitive damages to be fully and fairly presented in a single trial. Lastly, consolidation will save the defendant manufacturers considerable inconvenience and expense. Because the same 8 to 12 manufacturers are usually named as defendants in each asbestos lawsuit, the Court's consolidation will save these defendants the expense of litigating the issues of product defectiveness and punitive damages in 50 separate trials.

[3] If the plaintiffs prevail on the issue of product defectiveness at the consolidated trial, the Court will then need to address all remaining issues in the 50 individual cases which had comprised the consolidated trial. The issues remaining for resolution would be those of exposure, causation, injury and compensatory damages. As previously mentioned, these issues, unlike the issues of product defectiveness and punitive damages, involve distinct factual questions peculiar to each particular plaintiff and are thus not amenable to resolution in a single consolidated trial. The individualistic nature of these issues, however, does not preclude the Court from implementing a procedure to efficiently and fairly resolve all remaining issues in these 50 cases. Accordingly, the Court concludes that rather than conducting 50 individual trials, the residual issues of exposure, causation, injury and compensatory damages will be resolved by trying the cases in groups of five.

It has been the Court's experience that a jury can adequately comprehend and differentiate the evidence when 5 asbestos cases are joined together for trial.[1] The

1. On three occasions during the past year and a half the Court has successfully joined together the cases of 5 asbestos claimants for trial. The Court has found that this procedure significantly conserves the resources of both the Court and the litigants. In each of these cases, as in the instant case, the same counsel represented all plaintiffs.

Court expects to be able to efficiently try the groups of 5 cases because the lengthy state of the art evidence, fully presented at the consolidated trial on the issues of product defectiveness and punitive damages, need not be repeated. Since a period of six months or more may be required to conduct the consolidated trial on the issue of product defectiveness and all of the residual trials of 5 cases each, the Court proposes to use separate juries for the consolidated trial and each of the residual trials. The court's submission of the separate and distinct issues to separate juries will not violate the parties seventh amendment right to a jury trial. *Martin v. Bell Helicopter Co.*, 85 F.R.D. 654 (D. Colo. 1980); 9 C. Wright & A. Miller, *supra*, § 2391 at 302-303.

[4] The efficiency and utility of the foregoing procedure—the resolution of 50 pending asbestos cases by conducting a single consolidated trial on the issues of product defectiveness and punitive damages, followed by short trials of 5 cases each on the residual issues of exposure, causation, injury and compensatory damages—derives from the fact that two factual questions common to 50 pending asbestos cases can be fairly and efficiently resolved in one proceeding through a single presentation of the lengthy state of the art evidence. The defendants contend, inter alia, however, that the court may not properly implement this procedure because Texas law requires that the issues of punitive and compensatory damages be submitted at the same proceeding. If the defendants' contention is correct, the Court would be compelled to submit the punitive damages issue at each residual trial. This would require the repetition of the lengthy state of the art evidence in each of the ten residual trials, thus thwarting the court's attempt to achieve fairness and

efficiency. Upon a review of the Texas law on punitive damages, however, the Court is convinced that the issue of punitive damages may properly be presented at the consolidated trial even though the issue of compensatory damages will not be addressed until a later trial before a different jury.

When reviewing the reasonableness of an award of punitive damages upon appeal, Texas law provides that "the amount of exemplary damages should be reasonably proportioned to the actual damages found." *See e.g. Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1377 (5th Cir. 1982); *Southwestern Inv. Co. v. Neeley*, 452 S.W.2d 705, 707 (Tex. 1970). While the relationship between exemplary and actual damages should be proportional, no set rule, ratio or formula exists which will be considered reasonable in any given case. *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). The reasonableness of an award of punitive damages must instead be decided upon the facts of each particular case. *Id.* Since no precise ratio is ever required, the proportionality rule is really not a rule at all, but only a general standard or guideline. D. Dobbs, *Remedies* § 3.9 at 211 (1973). For example, Texas appellate courts have found a jury's award of punitive damages to be reasonable when the ratio of exemplary damages to actual damages has been 20 to 1, *Alamo Nat'l. Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981); 12.5 to 1, *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632 (Tex. Civ. App.—Houston, 1984, writ ref'd n.r.e.); 5 to 1, *Houston Lighting & Power Co. v. Sue*, 644 S.W.2d 835 (Tex. Civ. App.—Corpus Christi 1982, writ ref'd n.r.e.); and 2.5 to 1, *Ogden v. Wilson*, 649 S.W.2d 780 (Tex. Civ. App.—Austin, 1983, writ ref'd n.r.e.). Because the Texas proportionality rule

is merely a general guideline to be used upon review and in no way effects the jury's determination of the punitive damages award at trial, the Court is of the opinion that the rule does not preclude the court from submitting the punitive damages issue at the consolidated trial in the absence of any submission concerning actual damages.

In fact, the Court is of the opinion that the independent submission of the punitive damages issue at a consolidated trial may be the preferrable method. Because the purpose of punitive damages in Texas is not to compensate the injured party, but to punish the wrongdoer who caused the injury and to deter other parties from committing similar wrongful acts in the future, evidence regarding actual damages is technically irrelevant to the issue of punitive damages. The sole evidence which is relevant to the issue of punitive damages is that evidence which relates to the five factors, in addition to the reasonable proportionality requirement, which an appellate court must consider when reviewing the reasonableness of a punitive damages award: 1) the nature of the wrong; 2) the character of the conduct involved; 3) the degree of culpability of the wrongdoer; 4) the situation and sensibilities of the parties concerned; and 5) the extent to which such conduct offends a public sense of justice and propriety. *E.g. Alamo Nat'l. Bank v. Kraus,* 616 S.W.2d 908, 910 (Tex. 1981). All of the evidence which is relevant to these factors will be fully presented at the consolidated trial. At the conclusion of the consolidated trial, the jury will therefore have all of the relevant evidence before it necessary to resolve the punitive damages issue.

The Court's method of submitting the punitive damages issue should prove beneficial in other respects. Because

the jury which will decide the issue of punitive damages will not have heard any specific evidence regarding a particular plaintiff's injuries, the Court's procedure reduces the danger that a punitive award may be motivated by sympathy for an injured insulator. The submission of the punitive damages issue for 50 plaintiffs at one consolidated trial will also help to place the issue in its proper perspective as regards asbestos litigation. As previously mentioned, litigation premised on asbestos-related injuries has become a national problem of immense proportion. Because of the magnitude of asbestos litigation, the defendants and some judges and commentators have urged that punitive damages should not be recoverable as a matter of law in the context of asbestos litigation because of public policy considerations. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985). These proponents urge that if present plaintiffs are entitled to recover substantial punitive awards, the economic vitality of the responsible defendants will eventually be destroyed and potentially vast numbers of future asbestos claimants will be unable to recover even compensatory damages for their injuries. *Id.* It is also argued that repeated assessments of punitive damages fails to serve their dual role of punishment and deterrence when the potential liability of the asbestos defendants is virtually limitless. *Id.*

Current case law restrains this Court from ruling as a matter of law that punitive damages are not recoverable in asbestos litigation because of the aforementioned public policy considerations. The Court is of the opinion, however, that its procedure will encourage a punitive award, if any, which better serves the dual purposes of punitive damages in Texas because the jury, by considering the

issue of punitive damages for 50 separate plaintiffs, will receive a more realistic view of asbestos litigation and how the magnitude of the litigation effects the parties involved.

The Court has devised the foregoing procedure for the resolution of its pending asbestos cases because the large number of current claims and the lengthy nature of an asbestos trial precludes the Court from proceeding in the conventional manner of affording each plaintiff an individual trial. An attempt to conduct individual trials for each of the Court's more than 150 cases would result in an intolerable docket backlog and thereby deny allegedly injured plaintiffs their day in court. Individual trial of these claims would also greatly increase the total cost of litigation, and it is the Court's opinion that the cost of asbestos litigation today is exorbitant with the attorneys and expert witnesses reaping a disproportionate share of the total sums expended.[2] The need to reduce litigation costs seems particularly paramount in light of the defendants' assertions that the injuries of future asbestos claimants may go uncompensated because the defendants possess finite resources. While the Court is of course cognizant that its procedure is subject to some criticism, the Court is nonetheless convinced that the procedure is necessary to facilitate the fair and efficient resolution of the Court's pending asbestos cases.

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2. The Rand Corporation has estimated that of the more than one billion dollars asbestos defendants and their insurers have spent on asbestos litigation during the past decade, only 37 cents of each dollar was paid to injured plaintiffs as compensation.

APPENDIX

The Court submitted the following special interrogatories to the jury:

QUESTIONS TO THE JURY

QUESTION NO. 1

Do you find from a preponderance of the evidence that each of the parties' products listed below was an asbestos-containing insulation product capable of producing dust containing asbestos fibers sufficient to cause bodily injury in its application, use or removal?

Answer "Yes" or "No" for each parties' products:

Armstrong World Industries
- Block Insulation _____
- Pipe Covering _____

Celotex Corporation (successor to Philip-Carey)
- Block Insulation _____
- Pipe Covering _____

Eagle Picher Industries, Inc.
- Block Insulation _____
- Cement or Mud _____
- Pipe Covering _____

Fibreboard Corporation
- Block Insulation _____
- Pipe Covering _____

Owens-Corning Fiberglas Corp.
- Block Insulation _____
- Pipe Covering _____

Owens-Illinois, Inc.
Block Insulation _____
Pipe Covering _____

Pittsburgh Corning Corp.
Pipe Covering _____

Raymark Industries, Inc.
(formerly Raybestos-Manhattan)
Cloth _____
Tape _____

Standard Insulations, Inc.
Cement _____
Pipe Covering _____

If you have answered Question No. 1 "Yes" as to any product, then answer Question No. 2 as to each such product.

QUESTION NO. 2

Find from a preponderance of the evidence the date, if any, each party listed below knew, or should have known that insulators, pipefitters, and electricians were at risk of contracting an asbestos related injury or disease from the application, use or removal of each of such party's asbestos containing products for which you answered "Yes" to in Question No. 1.

With regard to this question you are instructed that in determining whether or not a manufacturer knew or should have known of the dangers involved in the application, use, or removal of his asbestos containing insulation products, a manufacturer is to be held to the knowledge and skill of an expert and at a minimum must keep abreast of scientific knowledge, discoveries and advances and is presumed to know what is imparted there-

by. A manufacturer has a duty to test and inspect his products. The extent of research and experiments must be commensurate with the dangers involved.

Answer by placing a date, if any, in the blank provided:

Armstrong World Industries, Inc.
- Block Insulation _____
- Pipe Covering _____

Celotex Corporation (successor to Philip-Carey)
- Block Insulation _____
- Pipe Covering _____

Eagle Picher Industries, Inc.
- Block Insulation _____
- Cement or Mud _____
- Pipe Covering _____

Fibreboard Corporation
- Block Insulation _____
- Pipe Covering _____

Owens-Corning Fiberglas Corp.
- Block Insulation _____
- Pipe Covering _____

Owens-Illinois, Inc.
- Block Insulation _____
- Pipe Covering _____

Pittsburgh Corning Corp.
- Pipe Covering _____

Raymark Industries, Inc. (formerly Raybestos-Manhattan)
- Cloth _____
- Tape _____

Standard Insulations, Inc.
- Cement _____
- Pipe Covering _____

If you have answered Question No. 1 "Yes" as to any product, then answer Question No. 3 as to each such product.

QUESTION NO. 3

Find from a preponderance of the evidence whether each of the products listed below was defective as marketed and unreasonably dangerous because of the manufacturer's failure to provide a timely and adequate warning to insulators, pipefitters and electricians after the date you have found, if any, for each product in Question No. 2.

With regard to this question, the Court instructs you that the manufacturer of a product has a responsibility to instruct consumers as to the safe use of its product and to warn users of dangers associated with its product of which the manufacturer either knows or should know at the time the product is sold. The Court further instructs you, however, that a manufacturer need not provide instructions or a warning unless the product was dangerous to an extent beyond that which would be contemplated by the ordinary user of the products with ordinary knowledge common to the community of users as to the products' characteristics.

"Adequate warnings and instructions" means warnings and instructions that are given in such form that they could reasonably be expected to catch the attention of the reasonably prudent person in the circumstances of the use of the product in question; the warning must be of an intensity justified by the magnitude of the risk and the content of the warnings and instructions must be of such a nature as to be comprehensible to the average user

and to convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person.

In answering with respect to each party and each product, you should consider each party and each product individually and separately.

Answer "Yes" or "No" as to each product for which you answered "Yes" in Question No. 1.

Armstrong World Industries, Inc.
Block Insulation _____
Pipe Covering _____

Celotex Corporation (successor to Philip-Carey)
Block Insulation _____
Pipe Covering _____

Eagle Picher Industries, Inc.
Block Insulation _____
Cement or Mud _____
Pipe Covering _____

Fibreboard Corporation
Block Insulation _____
Pipe Covering _____

Owens-Corning Fiberglas Corp.
Block Insulation _____
Pipe Covering _____

Owens-Illinois, Inc.
Block Insulation _____
Pipe Covering _____

Pittsburgh Corning Corp.
Pipe Covering _____

Raymark Industries, Inc.
(formerly Raybestos-Manhattan)
Cloth _____
Tape _____

Standard Insulations, Inc.
Cement _____
Pipe Covering _____

If you have answered Question No. 3 "Yes" as to any parties' products then answer Question No. 4 as to such party.

QUESTION NO. 4

Do you find from a preponderance of the evidence that the manufacturer's marketing of a defective and unreasonably dangerous product, if you have so found, in Question No. 3, constituted gross negligence in that the manufacturers acted with callous and reckless disregard to the welfare and safety of the plaintiffs.

Callous and reckless disregard means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the plaintiffs.

In answering with respect to each party you should consider each party individually and separately.

Answer "Yes" or "No" as to each party for which you answered "Yes" in Question No. 3:

Armstrong World Industries _____

Celotex Corporation (Successor to Philip Carey) _____

Eagle Picher Industries, Inc. _____

Fibreboard Corporation _____

Owens-Corning Fiberglas Corp. _____

Owens-Illinois, Inc. _____

Pittsburgh Corning Corp. _____

Raymark Industries, Inc.
(formerly Raybestos-Manhattan) _____

Standard Insulations, Inc. _____

Cement _____

Pipe Covering _____

If you have answered Question No. 4 "Yes" as to any party, then answer Question No. 5 as to such party.

QUESTION NO. 5

What sum of money, if any, do you find from a preponderance of the evidence should be assessed as punitive damages against each of the following defendants in favor of each plaintiff?

Texas law provides that in your discretion you may assess punitive damages against defendants whom you have found guilty of gross negligence. The purpose of punitive damages is not to compensate the injured party, but to punish the wrongdoer who caused the injury and to deter other parties from committing similar wrongful acts in the future. As I instructed you at the commencement of this trial, this trial is unique in that the cases of fifty plaintiffs have been joined together for the resolution of some, but not all, of the legal issues involved. The remainder of the issues will be resolved by different juries at subsequent trials. One of the issues to be resolved at the subsequent trials is the amount of money, if any, each plaintiff should receive as compensatory damages

for his injuries, if any. As regards compensatory damages, each plaintiff who prevails at his subsequent trial will be entitled to recover, upon a proper showing of proof, a fair and reasonable sum of money as compensation for the following elements of injury:

1) Pain, mental anguish, and loss of capacity for enjoyment of life.

2) Past and future medical expenses.

3) Physical impairment and loss of earning capacity in the past and in the future.

Although I have briefly explained to you the elements of compensatory damages which a different jury may be called upon to consider at a subsequent trial, you are in no way to consider these elements in awarding a sum of money, if at all, as punitive damages. In determining whether an assessment of punitive damages is appropriate in this case, you are only to consider what amount of money, if any, will serve to punish each of the defendants to which you have answered "Yes" to in Question No. 4, and deter other parties from engaging in similar conduct in the future.

As I have previously informed you, none of the fifty plaintiffs in this trial have cancer. Accordingly, in considering, if at all, any of the various cancer evidence you have heard during the course of this trial, you may consider the cancer evidence only as it relates, if at all, to the defendants' conduct in failing to warn.

The sum of money which you answer, if any, should *not* represent a lump-sum figure to be divided among the fifty plaintiffs who are joined in this trial. Rather, your answer should represent the amount of money, if

any, that *each* plaintiff should receive, assuming of course that he prevails at the subsequent stage of his trial, from each of the defendants which you have found to have been grossly negligent in Question No. 4.

Answer in dollars and cents, if any:

Armstrong World Industries	$_____
Celotex (successor to Philip Carey)	$_____
Eagle Picher Industries, Inc.	$_____
Fibreboard Corporation	$_____
Owens-Corning Fiberglas Corp.	$_____
Owens-Illinois, Inc.	$_____
Pittsburgh Corning Corp.	$_____
Raymark Industries, Inc. (formerly Raybestos-Manhattan)	$_____
Standard Insulations, Inc.	$_____

86-2011

No. .....

Supreme Court, U.S.
FILED
JUN 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CLARENCE J. WILSON, ET AL.,

Petitioners,

v.

ARMSTRONG WORLD INDUSTRIES, INC. ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS ARMSTRONG WORLD INDUSTRIES, INC., EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, OWENS-ILLINOIS, INC., AND OWENS-CORNING FIBERGLAS CORPORATION

JOSEPH D. CHEAVENS
BAKER & BOTTS
One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Counsel for Respondents Armstrong World Industries, Inc., Eagle-Picher Industries, Inc., Fibreboard Corporation, Owens-Illinois, Inc., and Owens-Corning Fiberglas Corporation

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(512) 224-5575

QUESTIONS PRESENTED

1. Did the trial court abuse its discretion by not dismissing a venireman for alleged bias where Petitioners did not challenge the venireman in the trial court on the basis of bias?

2. Did Petitioners waive any challenge for cause of the venireman based on the allegation of bias and can Petitioners demonstrate prejudice where:

   A. Petitioners did not challenge the venireman for bias in the trial court;

   B. The allegedly biased venireman was peremptorily stricken from the jury by Petitioners;

   C. Petitioners did not suggest to the trial court that they had any objection to nor that they would have peremptorily challenged any of the veniremen who were selected as jurors; and

   D. The Petitioners complain about a 12-0 verdict, and the parties had stipulated that a 10-2 verdict would be binding?

LIST OF PARTIES

PLAINTIFFS:

Robert C. Belinge
Vernon W. Botter
Lloyd B. Brannen
B. C. Brown
John W. Campbell
Russell F. Cash
Leslie B. Childers
Robert R. Childers
Edwin E. Cimerhanzel
John W. Copeland
Ralph Daigle
Gilbert P. Davis
Tommie L. Easley
Billy Green
Edward F. Grein
Johnny Louis Grein
Leo V. Grein
Marvin G. Grein
Wilford B. Grimes
James C. Harrison
Ernest L. Hartwell
William H. Howard
William C. Jones
Charles O. Kramer
Michael S. Massey
William J. Massey
Carl J. Moeller
Tommy L. Murphree
Luke Naquin
Louis E. Oldham
C. Oliver
Leemon R. Pennington
Joel Ross
Ralph Ross
Wilson E. Rudy
Alton B. Sanford
Jesse A. Shrader
William C. Stanley
Jeff Steed
David Strebeck
William C. Taylor
Harvey Lee Thompson
Johnnie C. Todd
Victor E. Turner
Murray E. Wilkening
Vernon T. Williams
Clarence J. Wilson
Frank J. Wishard
Augustin O. Zarate

DEFENDANTS:*

Armstrong World Industries, Inc.
Celotex Corporation
Eagle-Picher Industries, Inc.
Fibreboard Corporation
Owens-Corning Fiberglas Corporation
Owens-Illinois, Inc.
Pittsburgh Corning Corp.
Raymark Industries, Inc.
Standard Insulations, Inc.

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* A listing of all parent companies, subsidiaries and affiliates of the defendants filing this brief appears as Appendix B to this brief in compliance with Sup. Ct. R. 28.1.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated February 26, 1987, is reported at 810 F.2d 1358 and is reprinted as Appendix A. The District Court's opinion on unrelated issues is reported at 107 F.R.D. 250.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254. The date of the Fifth Circuit judgment is February 26, 1987, and the Petitioner's Motion for Rehearing was overruled on March 26, 1987.

STATUTES AND RULES INVOLVED

28 U.S.C. § 1866 provides in part:

> [N]o person . . . shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be . . . (2) excluded by the court on the ground that such person may be unable to render impartial jury service . . . or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown . . . .

28 U.S.C. § 1870 provides in part:

> In civil cases, each party shall be entitled to three peremptory challenges.
>
> . . . .
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

Fed. R. Civ. P. 46 provides in part:

> [I]t is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor . . . .

Fed. R. Civ. P. 47(a) provides:

> *Examination of Jurors.* The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

Fed. R. Civ. P. 48 provides:

> The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ...

CLARENCE J. WILSON, ET AL.,

Petitioners,

v.

ARMSTRONG WORLD INDUSTRIES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS ARMSTRONG WORLD INDUSTRIES, INC., EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, OWENS-ILLINOIS, INC., AND OWENS-CORNING FIBERGLAS CORPORATION

STATEMENT OF THE CASE

This is a products liability suit involving fifty plaintiffs (Petitioners) who claim that they suffered personal injury as the result of inhaling asbestos dust released by insulation products manufactured by defendants (Respondents).

The trial court, Honorable Hugh Gibson presiding, bifurcated the trial so that the issues of liability and punitive damages would be tried first and then, if necessary, compensatory damages would be determined in a subsequent trial. After a three-week trial, the jury returned a verdict finding that defendants had a duty to warn

of the potential dangers of their products beginning on August 1, 1966. The effect of the jury's answer was to exonerate six defendants and to find potential liability on the issue of product defect against three defendants. The jury found in favor of all the defendants on the issue of gross negligence.

During jury selection, the trial court conducted some voir dire examination and then permitted the attorneys for both sides to conduct further, more detailed examination. The venireman that plaintiffs now complain was biased, Dr. Wang, was questioned by the court and attorneys for plaintiffs.

At no time during jury selection did the plaintiffs challenge Juror Wang for bias. The only challenge made of Juror Wang was based on the unsubstantiated allegation that his employer, Dow Chemical Company, is involved in similar litigation. The trial court overruled plaintiffs' challenge.

In the Fifth Circuit Court of Appeals, plaintiffs argued that the trial court abused its discretion in not dismissing Juror Wang because of his alleged bias. The Fifth Circuit concluded that there was "no question that the district court correctly denied the challenge for cause on the basis of Dr. Wang's employment with Dow Chemical" and, in addressing the claim of bias, held that "since counsel for appellants neither pursued the matter nor mentioned it in their challenge for cause, we do not find an abuse of discretion requiring a new trial." 810 F.2d 1358, 1361.

REASONS FOR DENYING THE WRIT

A. The Trial Court Properly Exercised Its Discretion In Not Excusing Juror Wang Because Of Alleged Bias.

Whether a potential juror should be dismissed for cause rests within the sound discretion of the trial court, and the decision of the trial court is not grounds for reversal absent a showing of abuse of discretion or manifest prejudice. *United States* v.

Salinas, 654 F.2d 319, 328 (5th Cir. 1981); *United States* v. *Horton*, 646 F.2d 181 (5th Cir. 1981); *United States* v. *Brown*, 644 F.2d 101 (2d Cir. 1981), *cert. denied*, 450 U.S. 969 (1981). The trial court has this discretion because of its ability not only to hear the testimony of the potential juror but to see the juror and judge his manner and demeanor. *Reynolds* v. *United States*, 98 U.S. 244 (1878); *see also*, 47 Am. Jur. 2d *Jury* § 221 at 812 (1969).

If a litigant desires to challenge a venireman for cause, he must, in a timely manner, set forth clearly and distinctly the grounds for the challenge. Fed. R. Civ. P. 46. A simple challenge "for cause" is insufficient. 47 Am. Jur. 2d *Jury* § 216 at 804 (1969). In this case, Judge Gibson questioned the jury panel about any connection with, interest in, or knowledge of the defendants or their products (Transcript p. 7). Dr. Wang, venireman number six, responded to the court's inquiry. The discussion between Judge Gibson and Wang revealed that he had never worked with or studied asbestos, but he had read several articles on the subject (Transcript p. 12). A sidebar discussion with Judge Gibson was held, during which time Judge Gibson had ample opportunity to assess the responses of Wang and to study his demeanor and candidness. At that time, plaintiffs' attorney did not challenge Dr. Wang for cause, and Wang returned to his seat with the remaining panel.

The court allowed the attorneys to conduct more detailed examination pursuant to Fed. R. Civ. P. 47(a). Counsel for plaintiffs asked the jury panel if they could render an impartial verdict based on the evidence and the instructions from the court. (Transcript p. 34 - follow law), (p. 34 -compensate injured party), (pp. 35-6 - accept documentary evidence about hazards of asbestos in 30's and 40's), and (p. 37 - ability to award punitive damages). Dr. Wang gave no indication in response to these questions that he would not be fair and impartial.

During further voir dire of the jury, plaintiffs' counsel personally questioned Wang concerning his employment and knowledge of asbestos (Ballard at 42-44). Again, plaintiffs' counsel did not challenge Dr. Wang for cause.

After the voir dire examination, the following exchange took place between the court and the attorneys:

> Mr. Ballard: Your Honor, along that line, could we challenge Dr. Wang? He's the chemist that works for Dow and is very involved in asbestos litigation before this very Court.
>
> The Court: Has he been involved before this Court?
>
> Mr. Ballard: He hasn't, but his employer has, and he's in the chemistry department.
>
> The Court: Is there any objection to the challenging?
>
> Mr. Stamm: We object.
>
> The Court: I do not see a basis for challenging for cause.

(Transcript pp. 68-69)

There was no further discussion about Dr. Wang, and plaintiffs' counsel never again challenged or attempted to set forth any other basis for challenging Dr. Wang.

The discussion among Judge Gibson, Dr. Wang, and the attorneys at most may have evidenced a prior knowledge, or familiarity to some degree by Wang, of some of the general fact issues which might be presented at trial. However, jurors need not be totally ignorant of the facts or issues involved in the litigation in order to be qualified. *Dobbert* v. *Florida*, 432 U.S. 282 (1977). Judge Gibson, having the opportunity to assess Wang's demeanor during the exchange, and in the absence of any challenge for cause at that time, allowed Wang to return to the panel.

Plaintiffs never asked the court to disqualify Dr. Wang because of alleged bias. When plaintiffs finally did move to strike Wang,

the challenge was based solely on plaintiffs' unsubstantiated assertion that Wang's employer was involved in asbestos litigation (Transcript p. 69). Not only was that statement unsubstantiated, it was insufficient as a matter of law to disqualify Wang for cause. *Lusich* v. *Bloomfield Steamship*, 355 F.2d 770, 775 (5th Cir. 1966) (involvement in previous litigation by a prospective juror's employer was not grounds to sustain a challenge for cause); 28 U.S.C. § 1866. Plaintiffs did not even attempt to prove or suggest that Wang himself had any knowledge that his employer was allegedly involved in asbestos litigation. After Judge Gibson said that he found no basis for excluding Dr. Wang on the basis of his employment, plaintiffs never again raised a challenge nor articulated any other ground for challenge.

B. PLAINTIFFS WAIVED ANY CLAIM THAT VENIREMAN WANG SHOULD HAVE BEEN DISMISSED FOR BIAS, AND PLAINTIFFS CANNOT SHOW PREJUDICE.

Fed. R. Civ. P. 46 requires that an objecting or moving party state grounds for his objection or request for action to the court with reasonable particularity.

> The purpose for timely objection or motion as a precedent to review on appeal is two-fold. It provides the trial court with the opportunity to know the *specific* contentions and to take corrective action, if required. And — more importantly for appellant review — *it does not* permit a party to sit idly by, watching error being committed, and then take a "first" shot at the claimed error without having accorded the trial court the opportunity to correct its action. Such is not allowed.

Neu v. *Grant*, 548 F.2d 281, 287 (10th Cir. 1977) (citations omitted). This principle applies to all segments of the trial. *Id.*; *see also Alexander* v. *United States*, 138 U.S. 353, 355 (1891).

As noted, plaintiffs never requested the trial court to disqualify Dr. Wang because of alleged bias — the sole basis for their petition to this court. Instead, plaintiffs based their challenge for

cause in the trial court solely on the fact that Dr. Wang worked for Dow Chemical, allegedly a party in some asbestos suits. Plaintiffs do not now complain of the trial court's overruling that challenge, but complain that the court did not on its own strike Wang for bias. The allegation of bias, not having been raised in the trial court, was waived.

Plaintiffs also contend for the first time on appeal that the court's failure to strike Dr. Wang for cause was prejudicial because it forced plaintiffs to use a peremptory challenge on Dr. Wang rather than on Juror Leverton, who subsequently was chosen foreman by the jury. Plaintiffs' counsel questioned Juror Leverton at length (Transcript pp. 31-32; 49), but he never challenged Leverton for cause nor did he express any concern about Leverton's presence on the jury panel.

Plaintiffs should not be permitted to raise the claim that Juror Leverton was unacceptable for the first time on appeal. At no time was Judge Gibson informed of plaintiffs' alleged dissatisfaction with Juror Leverton. Previous opinions of this Court, in dicta, indicate that such displeasure must be made known to the trial court in order to preserve any alleged error in the selection of the jury. In *Lewis* v. *United States*, 146 U.S. 370 (1892) the Court listed several facts which, if present in the record, would have allowed the court to determine if the defendant's rights had been prejudiced by the government and the defendant striking several of the same jurors. Leading the list is that the record did not reflect that defendants made any effort to challenge jurors beyond the number allowed by the court and statute. *Id.* at 379. In *Stroud* v. *United States*, 251 U.S. 15, 21 (1919), a case in which a challenge for cause was denied and the juror was stricken peremptorily, this Court stated, "since there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable, we are unable to discover anything which requires a reversal upon this ground." The proper method of preserving error when a litigant has exhausted his peremptory strikes and,

therefore, must accept an objectionable juror, is to make it known to the trial judge before the venireman is seated that the venireman is objectionable and would be stricken if possible. *See Signal Mountain Portland Cement Co.* v. *Brown,* 141 F.2d 471, 477 (6th Cir. 1944). *See also Goldstein* v. *Kelleher,* 728 F.2d. 32, 38 (1st Cir.), *cert. denied* 469 U.S. 852 (1984).

The reasoning of the Texas Supreme Court's opinion in *Hallett* v. *Houston Northwest Medical Center,* 689 S.W.2d 888 (Tex. 1985), although not binding on this Court, is persuasive. In *Hallett,* the Texas Supreme Court held that to preserve error for failure to excuse a juror for cause, the complaining party must (1) use all peremptory challenges allotted and (2) advise the trial court that notwithstanding the use of the peremptory challenges, specific objectionable jurors would remain. Failure to establish such a predicate by the complaining party waived any error. *Id.* at 890.

The *Hallet* opinion recognizes that not requiring a litigant to advise the trial judge that he was being forced to take an unacceptable juror would encourage litigants to adopt a "wait and see" attitude about a juror's view of the facts. The only method of preventing this strategy is to require litigants to express their objections to a particular juror in the trial court. Judging a prospective juror's attitudes and deciding which jurors to strike is filled with uncertainty. The uncertainty is not completely resolved until the verdict is returned, and litigants should not be permitted to express their dissatisfactions with a juror for the first time after the jury has made its decision.

The plaintiffs did not properly object to nor specifically challenge Dr. Wang for cause except for the challenge based on the fact that Wang was employed by Dow Chemical Company. No abuse of discretion was committed by Judge Gibson in refusing to strike Dr. Wang on the only ground raised in the trial court. Further, no statement of any kind was made to show that plaintiffs in any manner were dissatisfied with Dr. Leverton. Even

assuming that Dr. Wang should have been dismissed for cause, plaintiffs cannot show that they were harmed because Wang did not become a member of the jury, and the plaintiffs did not complain about Juror Leverton until after the verdict was returned. A lack of harm is also conclusively established by the 12-0 verdict and the parties' agreement pursuant to Fed. R. Civ. P. 48 to accept a 10-2 verdict. Even if Dr. Wang had been dismissed for cause and Leverton stricken peremptorily, the verdict of which plaintiffs complain could have been at best 11-1 instead of 12-0.

CONCLUSION

The trial court correctly overruled plaintiffs' only challenge for cause of venireman Wang, and plaintiffs failed to make or preserve their challenge of Wang based on grounds raised for the first time on appeal. Nor can plaintiffs show how they have been harmed by the alleged error.

Far from involving substantial questions that warrant this Court's discretionary review, the alleged error complained of was not raised in the trial court and would have involved a discretionary ruling if it had been properly raised in the trial court. For these reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

CLARENCE J. WILSON, et al.,
Plaintiffs-Appellants,

v.

JOHNS-MANVILLE SALES CORP., et al.,
Defendants-Appellees.

No. 85-2727.

United States Court of Appeals,
Fifth Circuit

Feb. 26, 1987.

Rehearing and Rehearing En Banc
Denied March 26, 1987.

Products liability action was brought against manufacturers of products containing asbestos. The United States District Court for the Southern District of Texas, Hugh Gibson, J., entered judgment on jury verdict for certain defendants, and plaintiffs appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) refusal to sustain plaintiffs' challenge for cause to one of the veniremen was not abuse of discretion; (2) defendants' opening argument was not sufficiently prejudicial to deny plaintiffs fair trial; and (3) exclusion of plaintiffs' expert witness' testimony was appropriate sanction for witness' deliberate refusal to comply with discovery order.

Affirmed.

See also, D.C., 197 F.R.D. 250.

1. Jury (key)130

Denial of products liability plaintiffs' challenge for cause to venireman, in action against producers of asbestos-related prod-

ucts, was not abuse of discretion, though venireman was in same business as one of the defendants, where plaintiffs did not refer to question of venireman's personal bias in challenge for cause.

2. Federal Courts (key) 905

Products liability defendants' comments during opening argument, referring to plaintiffs' assertions as "pure nonsense" and to plaintiffs' "real motivation" as "simple greed," were not so prejudicial as to effectively deny plaintiffs fair trial where trial lasted three weeks and court instructed jury that opening statement assertions were not evidence.

3. Federal Civil Procedure (key) 1278

Exclusion of plaintiffs' expert witness' testimony, in products liability action, was not abuse of discretion, where expert deliberately refused to produce certain discovery material which court deemed relevant to defendants' case, absent evidence that expert was only expert who could testify in support of plaintiffs.

Grant Kaiser, Robert E. Ballard, Houston, Tex., for plaintiffs-appellants.

Michael B. Schwartz, Butler, Binion, Rice, Cook & Knapp, Elizabeth Thompson, Houston, Tex., for Raymark Industries, Inc.

Richard L. Josephson, Baker & Botts, Arthur Stamm, Houston, Tex., for Armstrong World Industries, Eagle-Picher, Owens-Illinois, Inc. and Owens-Corning Fiberglas.

Weller, Wheelus & Green, David L. Tolin, Beaumont, Tex., for Fibreboard Corp.

Mehaffey, Weber, Keith & Gonsoulin, Gene M. Williams, Sandra F. Clark, Beaumont, Tex., for Standard Insulations, Inc.

Hallmark & Boswell, John H. Boswell, Houston, Tex., for Armstrong World Industries.

Gray & Keene, Richard C. Keene, San Antonio, Tex., for Forth-Eight Insulations, Inc.

Beckenstein, Norvell & Bernsen, Gail C. Jenkins, Beaumont, Tex., for Celotex Corp.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal is from a jury verdict favoring appellees, manufacturers of asbestos products, in a consolidated products liability action involving fifty claimants. Appellants, the claimants, challenge three discretionary rulings of the district court and ask that the case be reversed and remanded for a new trial. They claim that the district court erred in failing to sustain their challenge for cause to one of the prospective jurors, in allowing appellees to make improper and prejudicial comments during opening statement, and in excluding the testimony of one of their expert witnesses. Because we find that the district court did not abuse its discretion, we affirm the judgment.

I. *Facts*

Appellants comprise a group of fifty insulators, pipe fitters, and electricians allegedly suffering from asbestos-related injuries and illnesses. Appellees are or were manufacturers of asbestos-containing insulation products. Each appellant individually had brought suit against the manufacturers in the Galveston Division of the United States District Court for the Southern District of Texas. Their causes of action were consolidated by order of the district court on February 21, 1985.

The district court ordered separate trials on the issues of liability and damages pursuant to Fed.R.Civ.P. 42(a). There first was to be a single trial to determine whether the manufacturers generally were liable to the claimants and whether punitive damages should be assessed. If the claimants prevailed on the issue of the manufacturers' liability, the court then would order separate trials to determine each individual's damages.

In the trial of the common issue of general liability, the jury found that while most of the products contained asbestos and were capable of producing sufficient dust to cause bodily injury, only Celotex Corp., Pittsburgh-Corning Corp., and Ray-Mark Industries, Inc. could be liable to appellants because they failed to warn adequately of the dangers of their asbestos-containing products. The jury also determined that none of the manufacturers had acted carelessly or recklessly. No punitive damages were assessed. The district court decided that there was no just reason for delay and entered a final judgment in favor of Armstrong World Industries, Eagle-Picher Industries, Inc., Fibreboard Corp., Owens-Corning Fiberglass Corp., Owens-Illinois, Inc., and Standard Insulations, Inc. Appellants then filed a timely notice of appeal from the take-nothing judgment involving the six appellees. The three remaining appellees did not seek an interlocutory appeal in this action, and their cases are still pending before the district court.

II. *The Challenge For Cause*

[1] Appellants request us to reverse the decision below and remand for a new trial becauxe the district court erred in refusing to sustain their challenge for cause to one of the veniremen, Dr. Wang. They contend that Dr. Wang's responses to questions posed by the district court clearly indicated the existence of actual prejudice and that, once bias was established, they automatically were entitled to have the district court excuse Dr. Wang. By denying their challenge for cause, the district court forced appel-

lants to use one of their peremptory challenges to strike Dr. Wang from the jury panel. Appellants also claim that as a result of the necessity to use a peremptory challenge when grounds for a challenge for cause had been established, they were unable to remove another objectionable juror, John B. Leverton, from the panel. Thus, they assert prejudice by the error of the district court. We do not find appellants allegations to be justified.

At the commencement of voir dire, the district court asked all of the prospective jurors, "Do have [sic] you have any connection at all, have any particular interest in or know anything particularly about any of these corporations, each of which at one time, if not now, was in the business of manufacturing and marketing asbestos products?" Dr. Wang informed the court that he was a research chemist with Dow Chemical and that, while he had never worked with asbestos, he had read about it. He stated that "the carcinogenicity [of asbestos] was not known until several years ago."

Dr. Wang's comments indicated the existence of some potential area of bias on his part. Once the possibility of actual prejudice has emerged, appellants argue that "the court has the duty to develop the facts fully enough so that it can make an informed judgment on the question of 'actual' bias." *United States* v. *Nell,* 526 F.2d 1223, 1229 (5th Cir.1976). We find no error in the district court's exercise of discretion in carrying out this duty.

After Dr. Wang made known his familiarity with asbestos, the district court immediately asked him to approach the bench. In the presence of counsel, the court conferred with him about his ability to return a verdict based solely on the evidence.[1] While

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[1] While at the bench, the following conversation took place:

THE COURT: You are a chemist and you have read about asbestos?

JUROR WANG: Yes.

Dr. Wang indicated that it would be difficult for him to be impartial, we cannot say that this evidence of bias is automatically disqualifying. The court apparently was satisfied by Dr. Wang's response and demeanor, and appellants made no objection.

After the court finished its own examination of the veniremen, all of the parties were allowed to examine the prospective jurors in order to explore fully any problems which they may have perceived. Appellants used this opportunity to question Dr. Wang extensively about the nature and scope of his employment at Dow Chemical, a company which they claimed was deeply involved in asbestos litigation. This concern served as the sole basis of appellants' challenge for cause to Dr. Wang.[2] The issue of actual

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THE COURT: And what is it that you read about it that you wish now to report?

JUROR WANG: Well, it's a carcinogenic, asbestos is known, for maybe about three or four years ago, maybe.

THE COURT: Okay.

JUROR WANG: And I'm making a new chemical which is usually not known as a carcinogenic or whatnot. You're making a compound and you don't —

THE COURT: Just a second. I want the best answer you can give me to this: Could you sit as a juror and listen to the evidence, and there's going to be evidence with regard to the characteristics of asbestos and what was known about asbestos at a given time in the past, and accept that testimony after you have weighed it for credibility, and come to a verdict based only on the evidence that you hear developed during the course of this trial; can you do that?

JUROR WANG: I'm afraid that I'm a little bit partial.

THE COURT: All right. You would — you would import into your thinking things that you knew regardless of what might be said upon the stand?

JUROR WANG: Yes, sir.

THE COURT: All right. Thank you.

[2] The following exchange took place at the close of voir dire:

MR. BALLARD: Your Honor, along that line, could we challenge Dr. Wang? He's the chemist that works for Dow and is very involved in asbestos litigation before this very Court?

or potential personal bias on the part of Dr. Wang was never raised by appellants until this appeal.

Since the district court is in the best position to observe the juror and to make a first-hand evaluation of his ability to be fair, it is given broad discretion in determining a juror's impartiality. *United States* v. *Salinas*, 654 F.2d 319, 328 (5th Cir.1981). "The determination as to the impartiality of a juror ... will not be reversed absent an abuse of [the court's] discretion." *United States* v. *Apodaca*, 666 F.2d 89, 94 (5th Cir.1982). *See also United States* v. *Brown*, 664 F.2d 101, 104 (2d Cir.1981) ("In order for a trial judge's determination of a juror's impartiality to be set aside, there must be shown 'manifest' prejudice.").

We find nothing in this case requiring us to reverse the decision of the district court. There is no question that the district court correctly denied the challenge for cause on the basis of Dr. Wang's employment with Dow Chemical. *See Lusich* v. *Bloomfield Steamship Co.*, 355 F.2d 770, 775 (5th Cir.1966) ("The mere fact alone that a member of the jury panel is in the same business as that of one of the litigants ... does not make him subject to challenge for cause."). The question of Dr. Wang's bias is somewhat ambiguous, and since counsel for appellants neither pursued the matter nor mentioned it in their challenge for cause, we do not find an abuse of discretion requiring a new trial.

Hopkins v. *County of Laramie, Wyoming*, 730 F.2d 603, 605 (10th Cir.1984) is closely analogous. It involved a civil rights action under 42 U.S.C. § 1983. At the conclusion of the voir dire, plaintiffs challenged three jurors for cause. The court denied the

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THE COURT: Has he been involved before this Court?

MR. BALLARD: He hasn't, but his employer has, and he's in the chemistry department.

THE COURT: Is there any objection to the challenging?

MR. STAMM: We object.

THE COURT: I do not see a basis for challenging for cause.

challenges, but asked plaintiffs if they had any further questions. They did not, and plaintiffs then exercised three peremptory challenges to excuse the jurors. On appeal, the Tenth Circuit found that since plaintiffs' counsel did not take advantage of the opportunity to convince the court of the propriety of the challenges for cause by asking further questions, it was not an abuse of discretion for the district court to deny the challenges. To the same effect is *United States* v. *Brown*, 644 F.2d 101 (2d Cir.1981), a criminal case. The defendant in *Brown* claimed that the district court should have sustained a challenge for cause to a potential juror who worked for another branch of the bank the defendant allegedly had robbed. Instead, the juror had to be removed by the use of a peremptory challenge. Upon appeal, the court held that since defense counsel was given the opportunity at trial to prove the contention that the prospective juror possessed actual bias and that opportunity was not pursued, the district court did not commit error by not finding such bias.

Since we find there was no abuse of discretion in the court's decision not to grant appellants' challenge of Dr. Wang for cause, we need not go into the question of whether prejudice resulting from an abuse of discretion has been shown.

III. *Opening Statement*

[2] Appellants claim that appellees' prejudicial arguments during opening statement effectively denied them a fair trial.[3] We are not persuaded. "To justify a reversal based on improper comments of counsel, the conduct must be such as to gravely impair the calm and dispassionate consideration of the case by the jury." *Dixon* v. *International Harvester Co.*, 754 F.2d 573, 585

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[3] Appellants allege that appellees' statements that "plaintiffs' assertion of gross negligence are pure nonsense" and that their "real motivation" was "simple greed" were improper appeals to prejudice and passion. They also claim that the comments concerning the jury as the final arbiter of what was fair were far beyond the proper scope of an opening statement.

(5th Cir.1985). The alleged offending remarks were made at the commencement of a three week trial which included the testimony of numerous live witnesses and the introduction of a large number of depositions and exhibits. It is highly unlikely that a few somewhat exaggerated statements by appellees' counsel in his opening presentation so impermissibly tainted the jury's verdict as to require a new trial.

Additionally, the district court clearly instructed the jury at the beginning of opening statement:

> On the other side, there is this statement that you should always keep in mind, and that is, what the attorneys say in opening statement and, lastly, in argument to you, when all the evidence is in, that what the attorneys say is not evidence. This is clearly so, because the attorneys will speak much, but they are not going to say a single word as a witness under oath, sitting in the witness box. And it is from there that the evidence comes. So what the attorneys say is not evidence. And you will keep that in mind.

The court repeated its warning after all the parties had made their opening statements:

> A brief comment before we conclude. . . . . I told you, and I will again remind you that the factual assertions that the attorneys have made in their opening statements is not evidence. . . . And secondly, the lawyers have recited what they think the Court is going to instruct you. They may and then again they may not be correct in that regard.

These cautionary instructions specifically address and effectively defuse possible prejudice that might have arisen assuming appellees' comments during opening statement went beyond proper bounds.

We have held that objectionable comments should be considered "within the context of the court's rulings on objections, the jury charge, and any corrective measures applied by the trial court. Alleged improprieties may well be cured by an admonition

or charge to the jury." *Westbrook* v. *General Tire and Rubber Co.*, 754 F.2d 1233, 1238 (5th Cir.1985) (closing argument challenged for impropriety.) In veiwing the opening statement as a whole, we find that the effect of appellees' allegedly improper statements, although somewhat more extreme than is the norm, was not prejudicial, especially in light of the court's cautionary instructions.

IV. *Exclusion of Expert Witness*

[3] Appellants' final contention is that the district court abused its discretion by excluding the testimony of Barry Castleman, one of appellants' expert witnesses. The exclusion, however, was the result of Castleman's deliberate refusal to produce certain discovery material which the court deemed relevant to appellees' case.[4] "Control of discovery is committed to the sound discretion of the trial court and its discovery rulings will be reversed only where they are arbitrary or clearly unreasonable." *Mayo* v. *Tri-Bell Industries, Inc.*, 787 F.2d 1007, 1012 (5th Cir.1986). We do not find any abuse of discretion.

The issue arose when appellees served Castleman with a subpoena *duces tecum* to produce certain documents at his

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[4] The court ordered Castleman to produce the following items before he would be allowed to testify:

1. Copies of any articles, pamphlets, parts of books or books written by you or to which you contributed, which are related to your expected testimony, whether actually published or not, and a list of all such documents.

2. Copies of any written correspondence which you have sent to or received from any organization that represents any concern in the asbestos litigation, whether a defendant plaintiff or litigation group.

3. Copies of any written correspondence which you have sent to or received from any governmental agency regarding asbestos, asbestos-related disease, the current defendants or any former defendants of these lawsuits, or relating to regulation of any industry that utilizes asbestos-containing products.

deposition on April 9, 1985 in Houston.[5] Castleman stated at the deposition that he would not produce the documents because he did not feel that the discovery order was appropriate. Castleman testified that the production of written correspondence between him and any asbestos litigation defendants, plaintiffs, litigation groups, or governmental agencies would threaten his ability to earn a living and would potentially jeopardize confidential relationships. There was no justification, however, for Castleman's refusal to comply with the court's order since the documents might have contained relevant information that Castleman was a paid "expert" witness in a number of asbestos cases and the amount of money he had earned through such testimony.

After Castleman's refusal, appellees moved for sanctions, and the district court ordered that Castleman not be permitted to testify until he complied with the discovery request. The exclusion was conditional, and Castleman was given every opportunity to produce the necessary documents. It is well established that "the district court has discretion to impose appropriate sanctions against noncompliance with discovery requests." *Carson* v. *Polley*, 689 F.2d 562, 586 (5th Cir.1982). This sanction was appropriate. Further, no showing is made that Castleman was the only expert who could testify in support of appellants. Appellants were not deprived of their case by the exclusion of a single recalcitrant witness.

CONCLUSION

The district court did not abuse its discretion in deciding the three procedural issues now before this Court. The judgment of the district court is

AFFIRMED.

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[5] Appellees had attempted to depose Castleman on March 20, 1985 in Washington, D.C., but he failed to appear.

APPENDIX B

Parents, Subsidiaries and Affiliates of Defendants

I. *Armstrong is the parent corporation for:*
   1. Armstar;
   2. Forms & Surfaces, Inc.;
   3. Armstrong-Nylex (PPY.) Ltd.;
   4. Inarco, Limited;
   5. Arm-star Venture Assoc.

II. *Eagle-Picher is the parent corporation of:*
   Diehl & Eagle-Picher GMBH.

III. *Fibreboard Corporation is a wholly-owned subsidiary of:*
   Louisiana-Pacific.

IV. *Owens-Illinois, Inc. partially owns or is affiliated with:*
   1. Cristaleria Ecuador;
   2. Electro-Plasma;
   3. Kimble-Terumo;
   4. O-I/Schott Process Systems;
   5. Owens-Illinois Puertor;
   6. Teleglas;
   7. Vifloca;
   8. Cajas Corrugadas de Mexico, S.A.;
   9. Cagas Y Emtagues de Occidente, S.A.;
   10. Companhia Industrial Sao Paulo E Rio;
   11. Colsol Limited;
   12. Cristal Owens Plasticas Ltd.;
   13. Cristaleria Del Ecuador, S.A.;
   14. Durobor, S.A.;
   15. Emballages Laurent, S.A.;
   16. Envases De Borosillcato, S.A.;
   17. Fabrica de Vidrio Los Andes, C.A.;
   18. Gerresheim Glas A.G.;
   19. Hankuk Electric Glass Co., Ltd.;
   20. Hellenic-Owens Elefsis Glass Co., S.A.
   21. Hygienic-Lily, Ltd.;
   22. Johnson Radley (U.G.);

23. Kraft, S.A.
24. Manufacturera De Vidrios Planos, C.A.;
25. Middle East Glass Manufacturing Company;
26. Nippon Electric Glass Co., Ltd.;
27. Owens-Illinois De Puerto Rico;
28. T. T. Igar Jaya;
29. P. T. Kangar Consolidated Industries;
30. Papeteries D'Espaly S.A.R.L.;
31. Papeteries Etienne, S.A.;
32. Sasaki-Owens Co., Ltd.;
33. Sun-Lily Co., Ltd.;
34. Union Glass & Container Corp.;
35. Vina Santa Rita, Ltda.

V. *Owens Corning Fiberglas Corporation partially owns or is affiliated with:*

1. Australian Fibre Glass;
2. Bayer Owens Corning;
3. Fiberglas Canada;
4. Fiberglass Iran;
5. Home Capital Funds;
6. New Zealand Fibre;
7. Van Gelder Owens-Corn(ing);
8. Veroc Technology;
9. Asahi Fiber Glass;
10. Amiantit Fiberglass Industries, Ltd.;
11. Fiberglas Colombia, F.A.;
12. Polyplaster, S.A.;
13. Scandinavian Glasfiber A/B;
14. Veroc Technology A/S;
15. Vitro-Fibras, S.A.